

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Marjorie Beyersdorf
Double M Faith Farm
T8121 N 33rd St
Wausau WI 54403-9478

PECFA Claim #54403-9478-21
Hearing #02-110

FINAL DECISION

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed March 21, 2002, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on July 30, 2002 at 201 West Washington Street, Madison, Wisconsin.

The issue for determination is whether the Department's decision dated February 25, 2002 was incorrect with regard to the items identified in Petitioner's Appeal filed on March 21, 2002.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Marjorie Beyersdorf
Double M Faith Farm
T8121 N 33rd St
Wausau WI 54403-9478

By: Steven J. Oseseck
Envirogen

1285 Rudy Street
Onalaska, WI 54650-0684

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: John A. Kisiel
Department of Commerce
201 W. Washington Ave., Rm 322A
PO Box 7838
Madison WI 53707-7838

The authority to issue a proposed decision in this matter has been delegated to the undersigned by order of the Secretary dated July 2, 2002. The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

1. At all times material, Marjorie Beyersdorf (hereinafter the “Appellant”) was the legal owner of the premises located at the Double M Faith Farm, T8121N.33rd Street, Wausau, Wisconsin.
2. On or before 10/26/01, the Appellant filed a claim for reimbursement of expenses associated with site cleanup for the premises described in Paragraph 1 in the total amount with additions of \$70,367.87 with the Wisconsin Department of Commerce, (hereinafter “the Department”). On 2/25/02, the Department made reimbursement in the amount of \$63,462.18.

3. The Appellant appealed the Department's denial of the following elements of her initial claim:
 - a. \$825.00 for costs associated with the use of an inflatable packer, which the Department stated was not included in the approved bid.
 - b. \$109.00 for charges in connection with laboratory services, which the Department stated was not the fee from the lowest bidder.
4. The Department conceded that it had incorrectly denied reimbursement for the costs identified in paragraph 3(b) above and agreed to make payment for those services.
5. By invoice dated 10/15/98, Boart LongYear contracting services charged the Appellant \$825.00 reflecting the cost of the unanticipated packing services described in paragraph 3(a) above. Insertion of the packing materials was necessary to prevent surface water leakage at the drilling site.
6. Boart LongYear had been the successful lowest bidder for the Appellant's remediation project. The \$825.00 packing fee was not included in Boart LongYear's bid.
7. The Department denied the packing cost because it was not part of Boart LongYear's original bid.
8. The Appellant admits that it neither sought a waiver nor attempted to submit an additional bid to cover the packing costs.

DISCUSSION AND CONCLUSIONS OF LAW

A. Preliminary Matters

The hearing began with the Department attorney examination of the PECFA claim reviewer who made the decision to deny packing cost reimbursement. After completion of questioning and before the Appellant's representative began the same, the Department's attorney sought to disallow the ability of the Appellant's representative to proceed. Pursuant to the Expedited Hearing Order, the Department's attorney states that the Appellant's identification of her representative and witness were not timely filed. The Administrative Law Judge noted the Department's objection for the record. The Judge allowed the hearing to continue and directed each party to provide a written statement describing communications that took place between the Department and the Appellant and/or her representative during the time within which the Expedited Hearing Notice and Order were mailed and the date of the hearing. After receipt and review of this information, the Judge informed the parties she would make a final determination regarding the Department's objection.

The information describing prior communications was provided by the Department's attorney and the Appellant's representative and is made a part of the record here. The Administrative Law Judge finds that the Department was not unduly prejudiced by the Appellant's delay. In making this ruling, the Administrative Law Judge relies on Pieper Elec., Inc. v. Labor and Industry Review Comn, 346 N.W. 2d 464, 118 Wis. 2d 92 (1984), where the rigid application of evidentiary rules runs runs contrary to administrative procedures. The Judge also finds that while the Appellant had requested in her letter of appeal, dated 3/18/02,

that copies of all correspondence regarding this matter be sent to her representative, such notification did not occur. The Appellant was the only individual who received documents regarding matters relative to this hearing.

The Administrative Law Judge also notes for the record that the Department's attorney, by letter dated 7/7/02, informed the Appellant's representative that the Administrative Law Judge allegedly received information regarding the issue involved herein from a PECFA senior hydro geologist. The Department's attorney purports to raise an issue regarding the Administrative Law Judge's ability to render an impartial and fair decision in the present matter because of this alleged ex parte communication. The information to which the Administrative Law Judge had access did not influence or have any bearing on the Administrative Law Judge's decision. Any action regarding the Administrative Law Judge's discussion with the PECFA senior hydro geologist is not warranted, appropriate or necessary.

B. Substantive Issues

The specific issues for determination are as follows:

1. Whether the Appellant's ability to obtain reimbursement for the packing costs should be allowed even though said costs were not included, pursuant to Comm 47.33(1)(b)(1) and 47.33(3), in the original bid specifications of the Boart LongYear itemization and were not made known to the Department at the time they were incurred.
2. Whether the \$825.00 packing fee falls within the Comm 47.33(5) exception to the otherwise standard bidding requirements.

At the hearing, the Appellant stated that the packing costs at issue were not part of Boart LongYear's original bid because the need for packing was not known prior to the time actual fieldwork commenced. The Appellant added that it was unaware of the Department's pre-approval or waiver requirements in situations involving unanticipated services and therefore did not attempt to notify the Department of changes to the original bid specifications. The Appellant also added that the packers needed to be inserted immediately and added that an attempt to receive an immediate response from the Department permitting the use of packers would have been futile and would have caused undue delay. Said delay would then have increased the entire cost of the project significantly and needlessly.

The Appellant's arguments do not provide exoneration for its failure to attempt to notify the Department of the unanticipated packing activity. The Department's bidding process is the cornerstone of the PECFA process, is clearly defined in Comm 47.33 and has been addressed in several PECFA announcements. The Appellant presumably knew or should have known that the Department would require notice of deviation from bidding costs before the Department would agree to reimburse unanticipated costs. Inherent in the bidding procedure is the need for the Department to regulate costs associated with remedial action. Changes to bid specifications, without notice, would erode the Department's ability to maintain predictability and equity over reimbursable costs. Regardless of whether the Department would have responded immediately, the Appellant needed to show that it, at the very least, attempted to notify the Department of the necessity for installing packing materials. Had the Appellant

attempted some means of notification, evidenced by reasonable documentation, its argument for reimbursement would be much more persuasive.

In the alternative, the Appellant argues that even if it failed to meet the bidding requirements of Comm 47.33, these costs should be considered exempt from said requirements because they involved a one-time fee for commodity services under \$1,000.00. This argument does not change the fact that the packing costs were associated with unanticipated drilling activities. The service provider who was retained to drill was the same one who inserted the packing materials. As described by the Appellant's witness, the materials were on the service provider's truck, available if necessary. The packing occurred while drilling was ongoing. Comm 47.33(5) cannot logically be interpreted to provide exemptions to PECFA's bidding requirements for individual components of an overall commodity service. Interpreting the exception in this way would essentially undermine the program's bidding process.

DECISION

For the reasons stated above, the Department shall not be required to reimburse the Appellant for the costs associated with the packing activities.

NOTICE TO PARTIES

Dated: _____

Mari A. Samaras-White
Administrative Law Judge
Department of Commerce
PO Box 7970
Madison WI 53707-7970

Copies to:

Marjorie Beyersdorf
Double M Faith Farm
T8121 N 33rd St
Wausau WI 54403-9478

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Envirogen
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REQUEST FOR REHEARING/JUDICIAL REVIEW

Hearing #02-110
Commerce # 54403-9478-21

Request for New Hearing

Petitions for new hearings must be received no later than 20 days after the mailing date of this hearing decision.

If, after you receive the decision, you believe it was based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. **To ask for a new hearing**, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Your request must explain why you believe the hearing examiner's decision is wrong. If you have new evidence to submit, you must describe your new evidence and explain why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or on the discovery of new evidence which could not have previously been obtained through due diligence on your part, your request will be denied.

The petition for new hearing must also be sent or faxed to all other parties named in this decision as "PARTIES IN INTEREST." **Late requests cannot be granted.** The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on all other parties named as "PARTIES IN INTEREST". **Late requests cannot be granted.** The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

Parties in Interest:

Marjorie Beyersdorf
Double M Faith Farm
T8121 N 33rd St
Wausau WI 54403-9478

By: Steven J. Oseseck
Envirogen
1285 Rudy Street
Onalaska, WI 54650-0684

John A.. Kisiel
Assistant Legal Counsel
Office of the Secretary
Department of Commerce

Date Mailed: _____
Mailed By: _____